MIXED QUESTIONS OF LAW AND FACT.

IN the illuminating book called "A Preliminary Treatise on Evidence at the Common Law," in which Professor Thayer has done so much, all through the outlying regions of evidence, to make the crooked straight and the rough places plain, there is a chapter devoted to the subject of "Law and Fact in Jury Trials." In its course, the author deals, among other things, with those questions which arise in negligence cases, and in other cases that turn upon the point of what is reasonable in conduct, and which are often described and referred to by the phrase "mixed questions of law and fact."

This phrase Professor Thayer condemns as inapt and misleading. He says:[1] —

"Baptizing the question of reasonable and probable cause with this name, as a 'mixed question of law and fact,' common and almost universal as it is, has only added to the confusion. All questions of fact, for a jury or for a court, are mixed questions of law and fact; for they must be decided with reference to all relevant rules of law; and whether there be any such rule, and what it is, must be determined by the court. Now since this mixture of law and fact is thus common to a variety of different situations, it is an uninstructive circumstance to lean upon when one seeks for guidance in discriminating these situations."

Again, he says,[2] in speaking of "the matter of reasonableness in general:" —

"The characteristic of all such questions is the same. The only rule of law is one which appeals to an outside standard, that of general experience; and the application of it, by whatever tribunal made, calls for a preliminary determination of something for which there is no legal test, — a matter of fact, and not a matter of law, — namely, the behavior, in a supposed case, of the prudent man. If the settling of such a question be matter of fact in ordinary cases of negligence, it is equally so in cases of malicious prosecution and false imprisonment; for saying this, notwithstanding the careless phraseology of our books, there is abundant authority."

Yet in spite of the passages just quoted and the weighty authorities which are marshalled in their support, it seems to the writer

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[1] At pages 224–225.

[2] At pages 227–228.

that the question of reasonableness, together with some other questions upon which courts or juries have to pass, may usefully be discriminated, on the one hand, from pure questions of law, and on the other hand, from ordinary questions of fact and of opinion as to fact; and that the phrase "mixed question of law and fact" points with accuracy to a real difference upon which the discrimination is grounded. Let it be said for clearness, that in calling a given question a question of fact or a question of law, it is here intended to refer to the nature of the inquiry which forms its subject, without regard to whether it is an inquiry to be answered by a court or by a jury.

In the first place, while it is true in a sense that "all questions of fact, for a jury or for a court, are mixed questions of law and fact; for they must be decided with reference to all relevant rules of law," is it true in the natural or ordinary sense of the phrase? Should we not rather say that, in most cases, there arise, not a mixed question of law and fact, but separable questions, one of law and one of fact; and that if we can only find out just what the law is and just what the fact is, the application of the law to the fact, which is where the mixture comes in, is perfectly simple, and presents no question at all? For instance, in a proceeding against a man whose building is claimed to exceed a height limited by the building laws, the court can tell the jury what is the legal limit of height — a question of law — and the jury can determine what is the height of the building — a question of fact, — and then, if the permitted height is found to be ninety feet, while the actual height is found to be one hundred feet, it takes no profound mental operation to conclude that the building is in excess of the height permitted. The conclusion is a mixed conclusion of law and fact, but the questions on the answer to which the conclusion depends are separable questions, one of pure law, the other of pure fact.

In the case just put, the rule of law admits of clear and precise statement. Every one knows what ninety feet is. There can be no difference of opinion about it. The "standard which it is the duty of [the] judicial tribunal to apply," to use the words Professor Thayer employs,[1] when speaking of law as contrasted with fact, is a certain one; "the determination of the exact meaning and scope of it" is easy; "the definition of its terms" is not required. But these things are not always so. For example, there has been much discussion among critics as to whether Hamlet was insane;

[1] At page 193.

and yet even after it is settled what is meant by Hamlet, whether a conception in Shakespeare's mind, or an impression produced upon the reader's mind, or an imaginary person possessing the qualities which a real person should be inferred to possess, if he had said and done the things that Hamlet says and does in the play, there still remains the question what insanity is. This generally passes *sub silentio;* unanimity is taken for granted; and yet when all is over, we find that the difference between critics proceeds about as much from difference of opinion as to what constitutes insanity as from difference of opinion as to the condition of Hamlet's mind. The condition of Hamlet's mind is matter of fact, or would be, if the imaginary Hamlet had been a real person. What constitutes insanity is a matter of a different sort; and these two matters, though presented in a single question, as if there were only one thing to be inquired about, are matters which need to be separated and kept separate.

To put this in general language, we may say that most questions call for a comparison of one thing with another. The thing to be compared is denoted by the first term, and the thing with which it is to be compared — the standard — is denoted by the second term. To make the comparison it is not enough to know in a general way what thing is pointed out as a standard: we must also be acquainted with this thing, and know the relevant qualities it possesses, and the degree to which it possesses them. If asked whether A is as tall as B, that is to say, whether A's height equals B's height, it is not enough to know who B is, and what is meant by his height, we must also know what his height is. If asked whether X has acted prudently, it is not enough to know in a general way what the word "prudence" means; we must know what the thing prudence is; what qualities it comprises, and in what degree a man must possess them in order to be called prudent. When that matter has been settled, so that there is no difference of opinion about it, then and only then, does the question present an inquiry into a single, unmixed question of fact, to wit, the character of X's conduct. Yet when a question of this kind is asked, it is generally taken for granted that all agree as to the exact nature and measurement of the standard of comparison which is set up. It is the falsity of this assumption, for it frequently is false, especially where the standard is denoted by some abstract word like prudence, insanity, or necessity, which is at the bottom of much misconception and arguing at cross-purposes; because until people know what they are disagreeing about, they

can rarely discover why they disagree. If questions are submitted to juries, or passed on by courts, in which the standard is denoted only by vague words, and is not precisely defined and measured, it is important to recognize the fact.

To illustrate such a situation by a non-legal example, suppose a jury of artists, selected at an exhibition of paintings with instructions to award medals to pictures of artistic excellence. If two of the artists, looking at the same picture, and seeing it in the same way, disagree as to whether it is entitled to a medal, they may differ in their estimate of the picture's merit, or they may agree as to the merit it possesses, but differ as to the degree of merit which it should possess in order to have artistic excellence. In the one case, they differ as to the character of the picture, a difference as to fact. In the other, they differ as to the standard which is to be applied to it. That is a difference about the rule or law which is to govern their decision; a difference which is possible, because the standard, namely, "artistic excellence," is indefinite. Given a building of known height, and reasonable men cannot well differ as to whether its height exceeds ninety feet. Given a picture calculated to make a known impression upon the beholder, and experts often cannot agree as to whether it deserves a prize. Obviously no definition of artistic merit can be framed that will resolve the difficulty; for it arises, not from faulty expression, but from the nature of the subject. What it takes, in quality and in degree, to make merit is and must remain a matter of opinion; and therefore the same men who decide what pictures are to receive prizes, inevitably and in the course of that very decision, set, as they are intended to set, the standard of merit to which the pictures shall conform. They are judges of law and fact. The alternative is only to adopt some other rule for awarding prizes than that of merit as such.

Similar situations arise in some classes of controversies at law. When it is disputed whether goods supplied to an infant were necessaries, the question may logically be divided into four parts. 1. What were the goods supplied, a simple question of fact. 2. How necessary were they to the infant, that is to say, to what degree of inconvenience would he be put if he had to go without them, a question of opinion as to fact. 3. What degree of inconvenience is requisite to make the articles necessary within the law, a question of law, because it sets the standard to be applied in every case of the sort, and is not related to the particular questions arising in the specific case. 4. Is the inconvenience which

it has been ascertained that the infant would have experienced if deprived of the goods, as great as the inconvenience which has been ascertained to be requisite for making them necessary?

It is the last question alone which involves the application of law to fact, and which, therefore, we might call a mixed question of law and fact, if we used the phrase in that sense in which we may say that every case involves such a mixed question; but here, as in every other case, it is a question that answers itself as soon as the other questions in the case have been answered, and so is practically no question at all.

The third question is primarily for the judge, and he may explain the subject to the jury as clearly as he can. But since it comes to a matter of opinion, — what is "reasonably" necessary, — it does not admit of precise definition; it remains inevitably a question of degree, and the jury are furnished with a criterion which they can apply only by the exercise of their judgment as to what it is; and in exercising that judgment they are making a judgment as to what the law is. Probably in close cases, verdicts often depend upon the meaning the jury attaches to the word "necessary."

So in an action for negligence. If the jury is asked whether the defendant was negligent, the inquiry upon analysis resolves itself, as in the previous case, into four parts: what was the defendant's conduct; what was the character of such conduct, or, in other words, what degree of avoidable risk to others did it involve; what character must conduct possess to be negligent, that is to say, in substance, what degree of avoidable risk to others is necessary to constitute negligence at law; and finally, whether the degree of risk involved was equal to that which the law stamps as negligent. In giving a verdict in a case like this, a jury passes upon law when it decides what degree of risk a man must avoid, or, since risk is avoided by taking care, how careful a man must be, to escape responsibility. That is to set the legal standard of carefulness.

A jury cannot escape from passing upon this matter of law, unless they can be referred to some matter of fact which will serve itself as a standard of carefulness with which the conduct of the parties may be compared, and thereupon approved as prudent or condemned as negligent, as it equals or falls short of the standard set. It is commonly said that the care which is due in a given case is that which a prudent man would exercise under the circumstances, if the risk were to his own person or property; and juries are asked to say whether a party has acted like a prudent

man. This is often spoken of as if it were a complete definition of negligence, as if it translated it into terms of pure fact. But though it goes some way toward the goal, it does not nearly reach it. It tells us to be sure that one should take the same care for the interests of others that he would, if prudent, take for himself. But when we come to the crux of the question, and ask how much care a man would, if prudent, take for himself, we get no answer. To set up for a test the conduct of a prudent man is partially to explain the question of negligence, by substituting concrete for abstract terms, but it is not in the least to answer it, or to substitute fact for law. "An act hath three branches; it is, to act, to do, and to perform:" volition, process, and accomplishment. So to act with discretion hath three branches; it is to be prudent, to take care, and to avoid negligence. He who acts from prudence as a motive takes due care as a means, and escapes negligence as a result. Those are different features of the same thing. A prudent man is a man that takes due care, and to define due care as the care exercised by a prudent man is merely to say that it is the care which is exercised by a man that exercises it. It is Polonius's definition, — "for to define true madness, what is it but to be nothing else but mad." Though perfectly true, the statement is only moderately helpful. Yet the common instruction of courts which expresses negligence in terms of prudence is frequently referred to as if it left a residuum of mere fact for the jury to deal with. "What is it that the law requires me to do to avoid being negligent?" asks a defendant of a judge. "To be prudent," says the judge, "and I will leave it to the jury to say whether you obeyed the dictates of prudence, but perish the thought that I am leaving it to the jury to say what the dictates of prudence are."

To be sure, if there were definite individuals known as prudent men, and if we could tell how they would behave under given circumstances, or if under given circumstances there were a line of conduct recognized as prudent, and we could find out what it was, the so-called definition would point to outside fact, and would furnish a standard by which conduct might be judged. But no such things exist. The prudent man is imaginary. It would be safe to bet on his acting prudently, though the heavens fell; but so long as we have to derive our notion of his conduct from our notion of what is prudent, we cannot derive our notion of what prudence requires from our notion of what he would do.

Nor does it furnish the jury with a matter of fact, which they may take as a measure of the quantum of care that the law re-

quires, to refer them to general experience. Certainly a juryman, if sensible, will found his belief about prudence upon his experience and upon what he supposes to have been the experience of others. Every one does or should found his opinions about what is prudent, just, moral, or expedient, whether in politics, business, or personal affairs, on experience as he interprets its teachings. When men differ about what it is proper to do, you cannot help them by saying that that is proper which general experience shows to be proper, for the teaching of experience is the thing they are disputing about. The complexity and diverseness of experience is the source, not the solution of the difficulty.

Moreover, it is hard to see how general experience, considered as a matter of fact, can furnish a standard for anything. A standard is something singled out from other things. General experience means things in general, with nothing singled out. To point out everything is to point out nothing. It is to perplex, not to simplify. But when it is said that the law of negligence appeals to the outside standard of experience, what is meant is that that is prudent which experience shows to be prudent; and the thing really referred to is not experience, which is matter of fact, but an inference to be drawn from experience, which is a matter of a different sort. It is the teaching of experience by which the conduct of the parties is to be tried, and it is the jury that is to decide what its teaching is. To furnish jurors for guidance with an inference to be drawn by themselves does not give them a legal measure of due care, it makes them supply the legal measure. It makes them judges of law. It is precisely because there is no legal test for negligence that the jury have to establish a test for it.

In a close case the question what care was under the circumstances due is as important and difficult as the question what care was taken; and jurors are as likely to differ or to be in doubt about it. Their doubt or difference cannot be removed by the court, even if it can be detected. For the word "prudence" is not capable of precise definition, or rather, the thing prudence is indeterminable and rests in opinion. Prudence includes ability to foresee what is likely to happen, and the chances of its happening; practical wisdom to tell whether it is well to have it happen, and to devise means for bringing it about or avoiding it; and besides all this, self-control to act as foresight and wisdom direct. To what degree a man may fairly be expected to exercise these qualities, even in his own affairs, is a question that a juryman of rash,

impulsive temperament will probably answer differently from one who by nature is overcautious.

The thing to be determined is not what the average man does, but what the average man may fairly be required to do. The prudent man may fall below or be required to rise above the average of care. The question of what is prudent, or more generally, what is reasonable, is the question of what is expedient, justifiable, or proper. Its appeal is to the practical, not the logical, reason. It is a question of ethical, not of physical, fact; of what ought to be, not of what is. It is a question which the substantive law should answer if possible; which the substantive law does answer as far as is possible; which it then generally turns over to the jury for them to answer, because in spite of the fact that the question is one of law, it has been unable, since the question is also one of opinion and of degree, to translate it into terms of fact by a definition that measures and defines.

Such a definition has, however, sometimes been furnished by statutes or by rules laid down by judges, which, by deciding the fact as to the character of given conduct, establish a new and definite rule of law. Such is the New Jersey statute which provides that a passenger, injured in getting off a train before it has stopped, shall be deemed guilty of contributory negligence. But when a judge tells a jury that a defendant must act as a reasonable or as a prudent man would act, he is not really laying down the rule of proper conduct by which the defendant's acts are to be judged; he is only indicating the principle that is to govern the jury's decision of it. It is the same, so far as the nature of the operation goes, as if in all cases charges to juries consisted simply of the statement that the law required parties to deal justly, to conform to the standard of the conduct of the just man, and on that alone it were left to them to determine what justice required in each particular case. Would it conduce to a clear understanding of the part played by juries in the administration of law to say that such juries were judges of mere matter of fact?

Questions of law of a similar nature may arise in cases involving the interpretation of statutes. The question of the meaning of the terms of a statute is a question of law, because it is a question as to what the law means, and what the law means, that it is.

So in Commonwealth *v.* Sullivan,[1] where the question was whether a certain game was a lottery within a statute, Holmes, J., said: —

"This having been determined to be a lottery in Commonwealth *v.*

[1] 146 Mass. 142, 145; Thayer, Prelim. Treat., 216.

Wright, it is not necessary to go on forever taking the opinion of the jury in each new case that comes up. Whether or not a definitely described game falls within the prohibition of a statute is a question of law. The defendant was bound to know at his peril. Whatever uncertainty courts may have felt upon a subject with which they are less well acquainted than some others of the community, in theory of law there is no uncertainty, and the sooner the question is relieved from doubt the better."

In that case, the character of the game seems to have been clear, so soon as one knew the way it was played, and the only thing left to find out was whether a game of that character was prohibited by law. But in the English case of Pearce *v.* Lansdowne,[1] there was need of an inference from the facts as proved, in order to determine their character. The question was whether a potman at a public house was a workman and not a "domestic or menial servant" within an Employer's Liability Act. The evidence as to the potman's duties was uncontroverted, and upon it the trial judge held that he was a domestic or menial servant. The appellate court severely rebuked him for having usurped the province of a jury. Their criticism seems well founded, for he undertook not merely to decide what the statute meant by menial servant, or, in other words, what the nature of an employee's position must be to make him a servant within the act (a matter which he might have explained to the jury by definition or otherwise) but also to draw an inference of fact, from the evidence, as to what the nature of the potman's position was. Perhaps the judge gave greater weight to the fact that the potman served beer to customers, as compared with the fact that he slept at his own house, and not at his employer's house, than a jury would have done. If so, he was treating a question of fact differently from the way a jury would have treated it. It was as if a judge and jury inspecting the portrait of a person present in court should differ as to how good a likeness it was. That would be a question of fact. How good a likeness it would have to be to oblige the sitter to pay for it would be a question of law. A judge who undertook to answer both questions would be doing what the trial judge did in Pearce *v.* Lansdowne.

If the foregoing observations are well founded, it would seem that there remains a question which in its nature is a question of law wherever the legal standard which is to be applied to the facts is not stated in terms so definite and clear as to leave no room for difference of opinion as to what it is that the law requires. Where

[1] 69 Law Times Rep. 316; Thayer, Prelim. Treat., 216, note.

there is room for such difference of opinion, the tribunal which applies the law to the fact, that is to say which decides whether the facts as found fulfil the requirements of the law as stated, interprets the law in making its decision, and really decides what its requirements are. In a general verdict the jury makes the application of law to fact; where the verdict is special, the judge makes it.

There is room for such difference of opinion, where the case requires the drawing of an inference of fact as to the character of the primary facts proved, such as whether conduct is prudent, delay reasonable, or a prosecution founded upon probable cause. For the question of character so raised is a question of opinion and of degree, and hence the words in which it is expressed are necessarily indeterminate, while the decision reached can only be stated in the terms of the rule of law which is to be applied to it. A special verdict is consequently impossible, and the same tribunal which characterizes the facts must interpret the law. For example, the jury in an action for negligence can only say whether the defendant was or was not negligent, and that mixes a decision as to the character of conduct with a decision as to the degree in which a man is required by law to exercise foresight, wisdom, and self-control. Since law and fact are thus inseparable, the jury must pass upon both, or the court must pass upon both.

In such a situation, it would seem reasonable to ascertain whether the question of fact or of law is the more difficult and important, and to assign the decision of both to jury or to judge accordingly. Such a result seems to have been reached in practice; for juries pass upon questions of negligence, where the facts are complex and go to the root of the case; and courts pass upon questions of probable cause, where the relevant facts are comparatively simple, and the jury may well be believed more likely to err as to the legal standard against which they are to be measured than the judge to err as to the inference of fact to be drawn from the primary facts as found.

Some lawyers in some jurisdictions have professed to remark a tendency in juries to make the law a respecter of persons, not to say a non-respecter of corporations, by varying the degree of care exacted of one party according to the degree of sympathy felt for the other. Divers remedies have been proposed. In considering the causes of the trouble and the propriety and feasibility of trying to correct it, it is material to notice that a jury in such a case attempts to exercise the somewhat anomalous function of judging law.

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